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In The

Supreme Court of the United States

October Term, 1994

ROBERT W. GUTHRIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a national organization[1] whose membership is comprised of more than 8,000 lawyers and 20,000 affiliate members who are citizens of every state. Members serve in positions that bring them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. NACDL is dedicated to the preservation and improvement of our adversary system of justice.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. The recent (and apparently increasing) attempts at expansion of federal power to define as criminal certain conduct which has traditionally been within the sole purview of state power, and which bears no clear relation to the defined powers of the federal government, presents a question of compelling importance to NACDL. For these reasons NACDL is honored to offer itself as *amicus curiae*

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[1] NACDL is organized under the laws of the District of Columbia. It was founded in Houston, Texas, in 1958. In 1984 NACDL moved its offices to Washington, D.C., where it is currently headquartered. Its members come from every state in the United States, as well as Puerto Rico, the Virgin Islands, Guam, and several foreign countries.

and to urge the Court to grant *certiorari* to address the highly significant question presented by Petitioner.

Pursuant to the Supreme Court Rules, Amicus has submitted the written consents of both Petitioner Guthrie and the Solicitor General.

II.

SUMMARY OF ARGUMENT

NACDL believes the writ should be granted because this case presents a question concerning the scope of federal power to define and prosecute crimes which is of exceptional public importance. The most significant and earnest constitutional dispute of our time is the dispute surrounding the exertion of "federal police power," under the aegis of the Commerce Clause, over local activity traditionally regulated by the criminal law of the states. That debate will intensify, and this Court will be confronted with further, related questions as Congress continues to expand federal criminal power.

The case is complementary to *United States v. Lopez*, No. 93-1290, in that it presents a slightly different aspect of the question of the limits of the federal commerce power presented in *Lopez*, and does so on a clear, uncluttered record in the context of the Sherman Act,[2] one of the oldest and oft-construed statutes creating a federal crime under the commerce power. The description of the limits of the commerce power is a proper judicial function. This Court should grant certiorari in this case to

[2] 15 U.S.C. § 1.

retain and clarify the traditional limitations on the reach of the Sherman Act and the commerce power.

III.

ARGUMENT

A. THE EXPANSION OF FEDERAL POWER POSES A QUESTION OF GREAT PUBLIC SIGNIFICANCE: IT HAS PROMPTED A CRISIS IN THE FEDERAL COURTS, DRAWN CRITICISM FROM STATE AUTHORITIES, AND LAUNCHED A NATIONAL DEBATE AMID PUBLIC WORRY ABOUT AN EXCESS OF FEDERAL POWER.

Concerns about the expansion of federal power in general, and about the particular federal power to define and prosecute crimes, give rise to one of the most significant constitutional debates of our time. The growth of the federal prosecutive apparatus has been held squarely responsible for the current crisis in the federal courts.[3]

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[3] The Federal Courts Study Committee, a Committee of lawyers, state and federal judges and members of Congress charged by Congress to study and report on the federal courts, found:

> At first almost all the nation's judicial business was handled by state courts; there were few federal judges and their jurisdiction was highly circumscribed. Even today, 90 percent of the nation's judicial business is handled by state rather than federal courts. With the expansion of the federal government – an expansion inaugurated by the Civil War, accelerated by prohibition and then by the New Deal, and accelerated further during the burst of federal lawmaking that began with President Johnson's "Great Society" programs

Federal judges have called for vast increases in the size of the judiciary,[4] arguing that without such growth the courts cannot do their jobs. Others worry about the ill effects of such growth on the federal courts as an institution.[5]

The Judicial Conference of the United States and various federal circuit judicial conferences have issued resolutions expressing worries about the effect of the expansion of federal criminal jurisdiction upon the very basis of federalism. In 1991, the United States Judicial

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> and has continued unabated ever since – the federal courts were bound to grow, both absolutely and relatively to the state courts. And grow they did. But until the 1950s growth was extremely gradual (except for a blip during Prohibition) and was easily accommodated . . .
>
> Through . . . various expedients . . . the federal courts had, until a year ago, managed to keep abreast of their dockets, though with some cost in the quality of federal justice . . .
>
> The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing judges in larger metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long-expected crisis of the federal courts . . . is at last upon us.

Report of the Federal Courts Study Committee, April 2, 1990, at 4-5 (parenthetical in original).

[4] *See, e.g.*, Stephen Rheinhardt, *Too Few Judges, Too Many Cases*, ABA Journal, Jan. 1993, at 52.

[5] *See, e.g.*, Gerald B. Tjoflat, *More Judges, Less Justice*, ABA Journal, Jul. 1993, at 70.

Conference opposed a proposed law which would define as a federal crime violent felonies involving handguns. The Conference said "[s]uch expansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism and would ignore the boundaries between appropriate state and federal action."[6] The Ninth Circuit Judicial Conference declared in 1993 that:

> The increasing federalization of traditional state law crimes by the Congress has a far-reaching impact on our conceptual ideal of the complementary roles of state and federal courts. Such actions by Congress evince a lack of respect and faith in the ability of the states to handle their affairs, and places an unreasonable burden on the much smaller federal court system to handle expanding criminal dockets.[7]

The federal courts, which bear much of the brunt of the changes brought by the expansion of federal power to prosecute crime, may have special reason to complain. But they are not alone in their criticisms of or concerns about federalism. The Conference of Chief Justices, which is "composed of the highest judicial offices of the 56 state, territorial and commonwealth court systems and the District of Columbia"[8] adopted a resolution prompted by the Senate's recent crime bill which said the Conference:

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[6] Judicial Conference of the United States, *Federalization of State Prosecutions, Position of the Judicial Conference of the United States* (Sept. 20, 1991). Appendix 7.

[7] Ninth Circuit Judicial Conference, *Memorandum No. 4* (August 1993). *See* Appendix 1.

[8] Letter of Chief Justice Jean Turnage to Hon. Edward M. Kennedy, February 28, 1994. *See* Appendix 4.

- Strongly believes that the prosecution of crime in our nation must be addressed in a meaningful way to provide resources and reinforcement for the efforts of state judicial, legislative, and executive leaders to address the problem of crime in their jurisdictions; [and]
- Strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing state criminal law and procedure . . . [9]

In 1980, a meeting of the National Governors' Association was attended by considerable criticism of the disproportionate power of the federal government (as Governor Lee Dreyfus of Wisconsin delightfully phrased the governors' complaint, "[t]he 'pluribus' is getting lost in the 'unum' ").[10] More recently, the National Governors' Association registered its concerns "that some attempts to expand federal criminal law into traditional state functions . . . could undermine state and local anti-crime efforts," and "urge[d] legislators to pursue policies that recognize rather than erode the states' role on the chief planners and administrators of criminal justice programs."[11]

In May 1987, 39% of Americans polled in a CBS/New York Times poll said the federal government had "too

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[9] Conference of Chief Justices, *Resolution IX* (Feb. 10, 1994). Appendix 10.

[10] Robert L. Turner, Boston Globe (Editorial) Aug. 8, 1980 (WESTLAW, Papers database).

[11] National Governors' Association, *HR-25 Policy* (July 1994). Appendix 13.

much power."[12] In June 1989, 61% of Americans thought the federal government had "too much power."[13]

These sentiments were focused by the crime bills recently passed by the House[14] and Senate[15] (a conference committee is presently at work to reconcile them). In addition to the resolutions quoted above, there has been a number of editorials and letters in the legal[16] and, to some extent, the popular[17] press.

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[12] CBS News/New York Times Poll, May 25, 1987. Appendix 9.

[13] Gallup Poll, Jun. 10, 1989. Appendix 8.

[14] H.R. 3355, 103d Cong., 2d Sess. (1994).

[15] S.B. 1607, 103d Cong., 2d Sess. (1994).

[16] *See, e.g., National Law Journal,* Podium, Nov. 8, 1993, and Letters, *National Law Journal,* December 27, 1993 ("Everyone knows that the Founders were extremely worried about the potential dangers of standing armies. They would have been no less worried about a national police force . . . "); January 17, 1994 ("Absent a specific state request for assistance [from a state legislature under Act IV sec.4] Congress has no power to punish domestic violence *per se* . . . "); April 19, 1994 ("our . . . leaders . . . are now furiously engaged in constructing an unprecedented national police machinery to be loosed on the public . . . "). *See also* Jim R. Carrigan and Jessica Bolger Lee, *Criminalizing the Federal Courts,* Trial (magazine), June 1994, at 50.

[17] *See, e.g., Perspective,* Atlanta Constitution, January 30, 1994:

> Supporters say the federal laws are needed to help stem the tide of crime and provide more resources for enforcement and incarceration to budget-strapped state governments.
>
> But critics charge that recent congressional actions are part of a continuing and dangerous trend to "federalize" whole new categories of crime. In their zeal to be

B. THIS CASE IS COMPLEMENTARY TO UNITED STATES V. LOPEZ, TOGETHER WITH WHICH IT FORMS A LOGICAL STARTING POINT FOR THE MODERN APPLICATION OF THE COMMERCE CLAUSE.

This Court summarized the commerce power in *Perez v. United States.*[18] The Court said the "Commerce Clause reaches, in the main, three categories of problems." Congress can regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities affecting commerce.[19]

Within the "affecting commerce" category, the Court identified two historical applications which describe the logical limits of the power: (a) Congress defines certain activities which may affect commerce, leaving it "to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act."[20] The Court has forged two tests to gauge whether the requisite effect on commerce has been shown: (i)

> seen as tough crime fighters, critics say, members of Congress have crossed the line – usurping the authority of the states to determine what is legal within their borders, duplicating laws already on state books, and blurring the distinction between the role of the federal government and that of the states.

See also Judge Carrigan's Warning the Issue: A Federal Judge Warns Against "Criminalizing the Federal Courts" – Our View: This Concern is Fully Justified, Rocky Mountain News (Editorial) March 8, 1994 (WESTLAW, Papers database).

[18] 402 U.S. 146 (1971).

[19] *Id.* at 150.

[20] *United States v. Darby,* 312 U.S. 100, 120-21 (1941).

whether the individual was "in the flow" of commerce, and (ii) whether there was a "not insubstantial effect on commerce." Alternatively, (b) Congress defines certain local conduct as having, in the aggregate, an effect on interstate commerce, as in *Perez;* the courts' only role is to determine whether the conduct in question fits Congress' description.[21]

This Court recently granted *certiorari* in *United States v. Lopez,* No. 93-1260 (April 18, 1994). *Lopez* appears to present the question whether Congress can regulate local conduct without making an explicit choice either to require proof of an effect on commerce in the individual case ("3(a)" above), or to define local conduct as having an aggregate effect ("3(b)", above), and, assuming it may, whether a court must imply a requirement to show an actual effect on commerce, as in "3(a)", above.

The *Guthrie* case presents a related issue: When Congress decides to control only conduct which a court can find affects interstate commerce, "as in the Sherman Act" ("3(a)" above), and where there is no proof (or any assertion) of any substantial effect on interstate commerce resulting from the local activities, does some later movement of funds over state lines subject the earlier conduct to federal regulation?

It is clear, given the intensity of the public debate and the direction of pending legislation,[22] that the lower

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[21] *Id.*

[22] The House, for example, has passed H.R. 3355, which is now under consideration by a conference committee seeking to reconcile it with a different Senate bill. If Title XIX of H.R. 3355 becomes law, this Court will doubtless be asked to decide

courts are going to be called upon soon to apply the "effects" and "flow" limitations on the Commerce Clause in new contexts. It is meet that the Court should furnish the lower courts with clear guidance created in the context not only of the new, untested legislation presenting a question under "3(b)" of the *Perez-Darby* formula, as in *Lopez*, but also, at the same time, with reference to the century-old, oft-construed Sherman Act (which falls under "3(a)", above). The *Guthrie* case presents that opportunity on a factual record which is clear, simple, and as the district court remarked,[23] virtually undisputed.

C. THE LIMITS OF THE COMMERCE POWER MUST BE SET BY THE COURT, NOT THE CONGRESS.

It has long been understood that Congress may oust, duplicate, or otherwise offend state power, if need be, in the exercise of its commerce power.[24] But it has never been held that federal power under the Commerce Clause

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whether federal authorities have power to prosecute juveniles possessing handguns (and if they do, whether individual proof of "flow" or "substantial effects" is required), based upon Congress' declaration, *inter alia*, that:

> Inasmuch as illicit drug activity and related violent crime overflow state lines and national boundaries, the Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to combat these problems.

1994 *Cong. Rec.* 2684 (April 25, 1994).

[23] *United States v. Guthrie*, 814 F.Supp. 942, 943 (E.D. Wash. 1993). Pet.App. at 8a.

[24] The *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

is utterly without limits. On the contrary, it has always been described as a limited power:

> [The] express grant of power to regulate commerce among the states has always been understood as limited by its terms and as a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.[25]

Plainly, were the commerce power unlimited, two hundred years of argument and precedent about its scope would have been superfluous, as would the Tenth Amendment itself. As to the latter, it bears noting that while the Tenth Amendment may be a mere "truism" describing, as the obverse of the powers granted to the national government, the residuum of power left to the states, it nonetheless must mean *something*. It is robbed entirely of its meaning if the constitutional power of the federal government is declared to be unlimited.[26]

The problem of interference with legitimate state interests in violation of the principle (arising from the Tenth Amendment) that "Congress may not exercise power in a fashion that impairs the states' integrity or

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[25] *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870).

[26] Insofar as the *Lopez* case involves federal efforts to suppress crime and "domestic violence," Article IV, Section 4 of the Constitution is also implicated. The Founders clearly did not want the national government to intervene against "domestic violence" without a request from the affected state. *Notes of Debates in the Federal Convention of 1787, Reported by James Madison* (W.W. Norton & Co. ed., 1987) at 474-75.

their ability to function effectively in a federal system"[27] is more than merely academic in the *Guthrie* case. The State of Washington has an "unfair competition" statute whose prescriptive terms are identical to section one of the Sherman Act.[28] However, the Washington Legislature has, in contrast to its federal counterpart, elected not to punish violations as crimes. The felony conviction of a person who neither affects nor is in the flow of interstate commerce nullifies conscious choices made by the state legislature without advancing any necessary or proper federal interest.

Prompted, no doubt, by the federal courts' traditionally "highly deferential"[29] attitude toward Congress's descriptions of its own power, at least one commentator has concluded that "the limits on congressional power under the Commerce Clause . . . remain those of self restraint."[30]

That, clearly, was not the framers' intention. Hamilton wrote:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that

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[27] *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

[28] Wash. Rev. Code § 19.86.030 (1993).

[29] *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993).

[30] *The Constitution of the United States of America: Analysis and Interpretation*, (Johnny H. Killian ed., 1987) at ix.

> the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[31]

The Framers' dream of an individual, dynamic economy has been fulfilled to an extent which the Framers could never have imagined. No economic activity in this country can be identified which does not somehow touch the national economy. However, this has never meant (until *Guthrie*) that the full spectrum of economic relationships are subject to federal regulation under the commerce power. The Framers, after all, firmly intended to place limits on the national power. The Court should grant *certiorari* to address this issue and clearly resolve it.

D. THIS CASE GIVES THE COURT THE OPPORTUNITY TO CLARIFY AND REAFFIRM TRADITIONAL LIMITS ON THE "FLOW OF COMMERCE" TEST.

The Court also has the opportunity in this case to clearly state the rules that determine when the federal

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[31] *The Federalist Papers by Alexander Hamilton, James Madison, and John Jay,* (Garry Wills ed., 1982) at 395 (Federalist no. 78). The Anti-Federalists did not disagree that restraining the federal legislature was an appropriate role for the federal courts, but worried that the courts could not be counted on to fulfill it. *Brutus XI,* January 31, 1788, *reprinted in, The American Constitution: For and Against,* (J.R. Pole ed., 1987) at 61-63. *See also Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

courts possess subject matter jurisdiction in antitrust cases under an "in-flow" theory of interstate commerce. The Court should do so.

As the petition points out, the Ninth Circuit Court of Appeals misunderstood and consequently misapplied this Court's "in the flow of commerce" jurisdictional nexus test. The Ninth Circuit not only misread this Court's precedents in *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), but journeyed well beyond the limitations imposed on the Commerce Clause in this Court's much criticized opinion in *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991).

In this case, the Ninth Circuit held that even though Guthrie paid local people for local real estate with funds drawn from and deposited in local accounts, the acts of the trustees (who were independent actors) in later sending their own checks (drawn on accounts containing funds paid by Guthrie) across state lines meant that Guthrie's purchases were in the flow of interstate commerce.

The Ninth Circuit's conclusions amount to errors of law. The Ninth Circuit's approach vitiates the limit on the ability of the federal government to reach purely local, intrastate matters. The limit should be preserved, both because the Constitution requires it, and to avoid a lopsided allocation of federal-state responsibility for policing trade practices.

The law governing the reach of the federal government under the Commerce Clause has permitted increasing intrusion into intrastate affairs since the Sherman Act's

passage in 1890. However, this Court has never permitted the "flow of commerce" theory to reach so decidedly local an activity as shown on the facts of this case.

Initially, when Congress first passed the Sherman Act, the federal government could reach only those activities actually "in commerce."[32] Soon, however, the Court expanded the Act's jurisdictional reach, until the Court settled on the "flow of commerce" theory.[33] In *Swift*, the Court held that even though the price-fixing agreement occurred entirely within one state, the conspiracy targeted the "flow" of goods over state lines.[34]

The flow theory extends only so far, however. An item does not enter the "flow" until it embarks on its journey out of the state,[35] and ceases to be in commerce once the item arrived at its destination, commingles with other goods or property, and is held for local use.[36] Even in more recent times, the Court has reaffirmed the limits on the "flow of commerce" theory.[37]

Subsequent cases have expounded on the "flow" theory of interstate commerce. However, as stated in petitioner's brief, the cases have not been entirely clear. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court

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[32] *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

[33] *Swift & Co. v. United States*, 196 U.S. 375 (1905).

[34] *Id.*

[35] *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[36] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[37] *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974).

stated that under the effects test, the jurisdictional nexus could be shown even as to local transactions in real estate if the requisite "effect" on interstate commerce is proved.

> Given the *substantial volume* of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been *sufficiently affected.*[38]

Later, however, in *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), the Court stated that *Goldfarb* means the "flow of commerce" theory may be invoked where the purely local services at issue are "integral" to some other interstate transaction.[39]

This Court should clarify the rule. Regardless of how one reads *McClain* and *Goldfarb*, neither case supports the expansive reading given these cases by the Ninth Circuit.[40] As the Commerce Clause conveys limited power,

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[38] *Id.* at 785. (Emphasis added.)

[39] 444 U.S. at 244-45.

[40] *Goldfarb*, for example, involved a state-wide mandatory fee-setting scheme among attorneys for performing services that, by law, only attorneys could provide, and without which no one could buy property at all. *Goldfarb*, 421 U.S. at 775-80. The facts established that a certain volume of transactions originating outside the state necessarily could not have been completed without being affected by the restraint of trade. The attorney's services were thus deemed an "integral" part of the interstate transactions. Here, the sale of a single piece of real estate did not make Guthrie's activities "integral," nor was the money Guthrie gave the trustees deposited "in the flow" of commerce.

so the "flow of commerce" theory requires specific limitations on its application. Otherwise, as the petition demonstrates, any number of economically insubstantial transactions would fall under federal regulation, with the dual ill effects of trivializing federal power and upsetting state arrangements governing purely local concerns.

This Court remarked upon the difficulties associated with an expansive "flow of commerce" theory in the context of the Robinson-Patman Act. The Court stated:

> [Respondents] would then have us expand the concept of flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. . . . The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme. More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored to the economic realities of interstate market, the intensely practical concerns that underlie the purposes of the antitrust laws.[41]

If the flow of commerce theory in the *Guthrie* case was correctly applied in the courts below, few, if any local activities are exempt. This result does not comport with either constitutional principles or a reasonable allocation of responsibility for policing trade practices. The states have a far greater concern in regulating such wholly intrastate activities. And, federal enforcement would not

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[41] *Gulf Oil*, 419 U.S. at 198.

sensibly further "the intensely practical concerns that underlie the antitrust laws."[42]

IV.

CONCLUSION

In sum, the unprecedented expansion of Congressional power creates an immediate need for guidance in the lower courts. *United States v. Guthrie* gives this Court the prime opportunity to define the limits of federal commerce power under the flow of commerce theory and to communicate those limits to the district and circuit courts. For these reasons, NACDL respectfully urges this Court to grant *certiorari*.[43]

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[42] *Id.*

[43] Finally, the Court should not overlook the peculiar circumstances under which Guthrie was tried and convicted. Two lawyers reassured Guthrie before the fact that his conduct was lawful. Guthrie was forbidden to tell the jury this, or of his own ignorance that his conduct might run afoul of the Sherman Act, of which he was unaware.

Both the lower courts held that the government was not required to prove that petitioner Guthrie knew his conduct was likely to produce an unreasonable restraint on trade as required by *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-45 (1978). The lower courts held that Guthrie's good faith belief that he acted lawfully was irrelevant. Given the special importance of *mens rea*, in the context of statutes with an interstate commerce jurisdictional basis, the lower courts were surely wrong. *See Posters 'N' Things v. United States*, 114 S.Ct. 1747 (1994).

RESPECTFULLY SUBMITTED this 22nd day of July, 1994.

National Association of Criminal
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1993 Resolution No. 4

Preserve the Historically Limited Role of the Federal Courts

Sponsored by

The Resolutions Subcommittee

WHEREAS, the Founders established two separate and independent judicial systems in this country, operating side-by-side; and

WHEREAS, until recently, the frequency and volume of conflicts arising from the joint and concurrent jurisdiction across the two systems has not had a disparate effect on either system; and

WHEREAS, recent actions by the Congress have significantly expanded federal jurisdiction into what had formerly been traditionally and exclusively state criminal law areas; and

WHEREAS, the increasing federalization of state law crimes poses a serious threat to the proper jurisdictional balance between the two court systems; and

WHEREAS, one serious side effect of this trend has been to dramatically increase the criminal dockets in the federal courts, reducing the ability to timely exercise their other important federal law functions in civil and noncriminal areas;

NOW, THEREFORE, BE IT RESOLVED THAT:

The Legislative and Executive Branches of the federal government should convene a national commission on the role of the federal judiciary, composed of members of

each branch of government along with highly respected state representatives, to:

1) Consider the appropriate role and function of the federal courts; and

2) Develop guidelines for the establishment of new federal crimes or causes of action based upon the enduring principles of a healthy federalism; and

3) Recommend such other measures to ensure the preservation of a proper balance between the state and federal court systems.

Statement of Reasons

The increasing federalization of traditional state law crimes by the Congress has a far-reaching impact on our conceptual ideal of the complementary roles of state and federal courts. Such actions by Congress evince a lack of respect and faith in the ability of the states to handle their affairs, and places an unreasonable burden upon the much smaller federal court system to handle expanding criminal dockets.

The Founders intentionally established dual judicial systems to preserve the independence of the states in a way that was compatible with the role of the national sovereign. This delicate balance is jeopardized by actions which tend to place greater reliance on one system over another for the enforcement of our criminal laws.

Other courts and circuits, the Sixth Circuit in particular, have passed resolutions urging the Congress to curtail the passage of legislation that federalizes state law and

impairs the jurisdictional balance between the state and federal courts.

This resolution urges the Congress and the Executive Branch, before proceeding further down the path of federalization, to create a high level national commission composed of members of all three branches of government and representative of the states – governors or former governors, law enforcement personnel, judges, respected academics – to carefully examine the relationships involved and to make principled recommendations to each branch for the best way to preserve the fundamental structure of our democracy.

Conference of Chief Justices

OFFICE OF GOVERNMENT RELATIONS

National Center for State Courts
1110 North Glebe Road, Suite 1090
Arlington, VA 22201-4795
(703) 841-0200/FAX: (703) 841-0206

President
Jean A. Turnage
Chief Justice
Supreme Court of Montana

February 28, 1994

Honorable Edward M. Kennedy
United States Senate
SR-315 Russell Senate Office Building
Washington, DC 20510-2101

Dear Senator Kennedy:

At its recent Midyear Meeting, the Conference of Chief Justices passed a resolution "Congressional Crime Legislation: Violent Crime Control and Law Enforcement Act of 1994." A copy of the Resolution is enclosed. I urge you and your colleagues to consider its content carefully.

The Conference of Chief Justices (CCJ) is composed of the highest judicial officers of the 56 State, Territorial and Commonwealth court systems and the District of Columbia. CCJ is to the State courts what the National Governors Association is to the State executive agencies.

In our Resolution, the Conference expresses strong support for the efforts of Congress to address the very serious problem of crime in our country. We believe those problems threaten the very fiber of society and require immediate action to assure the safety of our citizens and

their property as well as long-term action that addresses systemic crime problems.

However, the collective experience of 56 systems of criminal justice demonstrates that Federal efforts are more effective when they complement rather than supplant State law and procedure. Crime is pervasive across the nation and, in more than 95 percent of all the cases, investigation, prosecution and adjudication is and must be accomplished by State law enforcement and State courts. The concept of Federalism, as expressed in the Tenth Amendment of the United States Constitution, whereby the Federal government concentrates on those criminal enterprises that are beyond the scope and reach of State capabilities and supports enforcement and punishment by the states at the local level, provides for the most effective and efficient use of Federal and State resources.

Many of the provisions of the Senate version of H.R. 3355 are not consistent with these legal principles and our practical experience. We urge the members of the Senate and House to reconsider the bills before them, and draft legislation founded on the principles set forth in the resolution of the Conference of Chief Justices, which will, in our view, most effectively address the difficult problems of crime in each community across the country as well as the country as a whole.

If you have questions regarding the CCJ Resolution, or wish further elaboration on the position, I would urge you to contact the Chair of our Committee on State-Federal Relations, Chief Justice Lyle Reid of Tennessee

(615/741-2484), or our Washington Liaison, Thomas Henderson (703/841-0200).

Sincerely,

/s/ Jean A. Turnage
Chief Justice Jean A. Turnage

Encl.

Federalization of State Prosecutions
Position of the Judicial Conference
of the United States

The Judicial Conference of the United States opposes legislation adopted by the Senate which would expand federal criminal law jurisdiction to encompass homicides and other violent state felonies if firearms are involved. Such expansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism, and would ignore the boundaries between appropriate state and federal action.

The addition to federal jurisdiction of virtually any crime committed with a firearm that has crossed a state line will swamp the federal courts with routine cases that states are better equipped to handle, and will weaken the ability of the federal courts effectively to deal with difficult criminal cases that present uniquely federal issues.

Not only will bona fide federal criminal prosecutions suffer if the Senate's expansive firearms provisions are adopted, but federal courts, overburdened by criminal cases, will be unable to carry out their vital responsibilities to provide timely forums for civil cases.

Question:

R08 Which level of government do you think has too much power today – federal, state, or local?

Responses:	
1. Federal	61%
2. State	9
3. Local	4
4. All of them (vol.)	8
5. None of them (vol.)	6
6. Don't know/No answer	12

Survey Organization:	Gallup Organization
Research Sponsor:	Advisory Commission on Intergovernmental Relations
Population:	National adult
Population Size:	1029
Interview method:	Personal
Beginning date:	JUN 10, 1989 Ending date: JUN 18, 1989
Source Document:	Changing Public Attitudes On Governments & Taxes
Date or Source Document:	JUN 1989
Subject:	GOVERNMENT FEDERALISM POWER

FULL QUESTION ID: USGALLUP.89ACIR.R08

Question:

R36 Think about relations between the states and the federal government. Does the federal government have too much power, do the state governments have too much power, or is the balance about right?

Responses:

Federal too much	39%
State too much	5
About right	47
No opinion	9

Survey Organization:	CBS News/New York Times
Population:	National adult
Population Size:	1254
Interview method:	Telephone
Beginning date:	MAY 11, 1987 Ending date: MAY 14, 1987
Source Document:	CBS News/New York Times
Date of Source Document:	MAY 25, 1987
Subject:	FEDERALISM GOVERNMENT

FULL QUESTION ID: USCBSNYT.052587.R36

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President
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Chief Justice
Supreme Court of Montana

RESOLUTION IX

Congressional Crime Legislation
Violent Crime Control and
Law Enforcement Act of 1994

WHEREAS, the Senate version of H.R. 3355, which has passed the Senate and has been sent to conference, would result in the indiscriminate federalization of crimes, the needless disruption of effective state and local enforcement efforts, and the inefficient use of the special but limited resources of the federal courts; and

WHEREAS, state courts and prosecutorial agencies are responsible for more than 95% of all criminal prosecutions in the United States; and

WHEREAS, by imposing on States federal standards and programs, the proposed legislation would curtail the selective use of pretrial detention, sentencing and parole; and would invalidate principles of substantive state law – areas in which States have a constitutional responsibility under the principles of federalism

and a long and proven history of successful initiatives; and

WHEREAS, in addition to contravening principles of federalism, this legislation is further flawed because it: 1) assumes without foundation that states have been unresponsive and ineffective in addressing crime; 2) fails to enact plausible solutions for violence, drugs, weapons or gangs; 3) creates an illusion by enacting new criminal law without providing the resources required for the federal government to enforce that law, and 4) disrupts funding of state criminal processes by favoring police and corrections with federal funds while disregarding the need this creates for commensurate resources for courts, prosecutors and defense counsel; and

WHEREAS, the command of the 10th Amendment encourages each state to serve as a laboratory for development of legal remedies and principles in criminal and civil law, without intrusion of federal authority.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices:

- strongly believes that the problems of crime in our nation must be addressed in a meaningful way to provide resources and reinforcement for the efforts of state judicial, legislative and executive leaders to address the problems of crime in their jurisdictions;

- strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing State criminal law and procedure; and

- strongly opposes provisions of the proposed legislation which would require that the limited resources of the federal courts be expended in the prosecution and trial of ordinary street crimes, to the exclusion of interstate crime syndicates, corruption in public office, the vindication of individual constitutional rights and other traditional federal issues.

Adopted by the Conference of Chief Justices at the Seventeenth Midyear Meeting in Sea Island, Georgia, on February 10, 1994.

NATIONAL GOVERNORS ASSOCIATION

Howard Dean, M.D.
Governor of Vermont
Chair

Tommy G. Thompson
Governor of Wisconsin
Vice Chair

Raymond C. Scheppach
Executive Director

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[LOGO]

HR-25. FEDERALIZATION OF CRIME CONTROL

EACH LEVEL OF GOVERNMENT – FEDERAL, STATE, AND LOCAL – PLAYS A ROLE IN FIGHTING CRIMINAL ACTIVITY. CONTROLLING CRIME, PARTICULARLY VIOLENT CRIME, WILL REQUIRE STRONG AND EFFECTIVE ACTION AND COOPERATION BY FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT OFFICIALS.

TRADITIONALLY, STATE AND LOCAL GOVERNMENTS ARE ON THE FRONT LINES OF CRIME CONTROL. VIRTUALLY ALL PLANNING OF CRIMINAL JUSTICE ACTIVITIES, AS WELL AS THE PROSECUTION AND INCARCERATION OF VIOLENT CRIMINALS, OCCURS AT THE STATE LEVEL. THE FEDERAL GOVERNMENT HAS SERVED LARGELY IN A SUPPORTING ROLE IN THIS EFFORT, PROVIDING RESEARCH, DATA, ANALYSIS, MATERIAL, AND HUMAN RESOURCE ASSISTANCE FOR STATE AND LOCAL GOVERNMENTS.

IN RECENT YEARS, THE FEDERAL GOVERNMENT HAS CREATED OR HAS CONSIDERED CREATING PENALTIES FOR A WIDE RANGE OF CRIMES AND ACTIVITIES THAT ARE TYPICALLY PROSECUTED AT THE STATE LEVEL. THE NATION'S GOVERNORS ARE CONCERNED THAT SOME ATTEMPTS TO EXPAND FEDERAL CRIMINAL LAW INTO TRADITIONAL STATE FUNCTIONS WOULD HAVE LITTLE EFFECT IN ELIMINATING CRIME BUT COULD UNDERMINE STATE AND LOCAL ANTICRIME EFFORTS. FURTHER, THE GOVERNORS ARE CONCERNED THAT FEDERAL CONCURRENT JURISDICTION IN CRIMINAL JUSTICE EFFORTS CAN BE USED BY THE FEDERAL GOVERNMENT AS A MEANS TO IMPOSE UNDUE MANDATES ON STATE AND LOCAL GOVERNMENTS THAT WORK TO DISRUPT STATE AND LOCAL CRIME FIGHTING EFFORTS.

THE NATION'S GOVERNORS RECOGNIZE AND WELCOME THE FEDERAL GOVERNMENTS UNIQUE CAPABILITIES AND RESOURCES IN THE FIGHT AGAINST CRIME. ULTIMATELY, SUCCESS CANNOT BE ACHIEVED WITHOUT FEDERAL ASSISTANCE. THEREFORE, AS THE FEDERAL GOVERNMENT CONTINUES TO CONSIDER HOW IT CAN BEST WORK TO ELIMINATE CRIME, THE GOVERNORS URGE LEGISLATORS TO PURSUE POLICIES THAT RECOGNIZE RATHER THAN ERODE THE STATES' ROLE AS THE CHIEF PLANNERS AND ADMINISTRATORS OF CRIMINAL JUSTICE PROGRAMS.